SUPREME COURT, U. S.

AUG 11 1969

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 267

[redacted],

Petitioner,

vs.

[redacted],

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE PETITIONER

[redacted]
[redacted]
[redacted]
[redacted]

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 267

DENNIS MCGLENN MOOR,

Petitioner,

vs.

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Maryland Court of Special Appeals is reported in 1 Md. App. 508, 232 A. 2d 277 (1967) and is appended at p. 15 of the Appendix herein. The opinion of the Maryland Court of Appeals is reported in 250 Md. 468, 243 A. 2d 561 (1968), and is appended at p. 18 of the Appendix herein.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., Sec. 1257 (3) and Rule 19B of the Rules of this Honorable Court.

Constitutional Provisions Involved

1. Amendment Five to the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Amendment Fourteen to the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I.

Should the decision of this Honorable Court in *North Carolina* v. *Pearce* and *Simpson* v. *Rice*, 395 U.S. ——, 23 L. Ed 2d 656, 89 S Ct 2072, decided June 23, 1969, be held to be retroactive?

II.

Are the decisions in *North Carolina* v. *Pearce*, *supra*, and *Simpson* v. *Rice*, *supra*, applicable to the instant case?

III.

Does the increase of sentence imposed upon the Petitioner at the conclusion of his second trial on the same offense for which he was formerly convicted constitute a violation of the double jeopardy provision of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

The Petitioner, Dennis Mullene Moore, was convicted on June 7, 1966, in the Circuit Court for Montgomery County, Maryland, after trial by jury, on Count One of Criminal Number 7640, which charged him with Armed Robbery, for which he was sentenced to twenty years imprisonment by Judge James Pugh; and on Count Six of Criminal Number

Summary of the Argument

ARGUMENT

POINT I

This Court's Decision in North Carolina v. Pearce and Simpson v. Rice, 395 U.S. ___, 23 L. Ed 2d 656, 89 S. Ct. 2072 (1969) Should Be Held to Be Fully Retroactive.

A new principle may have been formulated by this Court in the recent decision in *Jenkins v. Delaware*, [illegible] in which this Court seems to have extended its decision in *Johnson v. New Jersey*, *supra*, by holding that a defendant convicted before the decision in *Miranda v. Arizona*, *supra*, but whose second trial after a successful appeal took place after the *Miranda* decision, was not entitled to the benefits of the *Miranda* decision.

In Footnote 7 to *Jenkins v. Delaware*, *supra*, the Court appears to be approaching as a new criteria the point of initial reliance, presumably by law enforcement officials, it would appear, therefore, to be distinguished from the instant case. It might be said that the Court seems to be adopting a strictly philosophy on the principle of retroactivity when it says:

> "For initial approach to prospective decision making has undergone some modifications. Compare Linkletter v. Walker, [citation omitted] with Desist v. United States, [citation omitted]. With reluctance we began placing increasing emphasis upon the point at which law enforcement officials relied upon precedent and its overruling, and more recently we have adopted the point of initial reliance. See, e.g., Desist v. United States, *supra*; Stovall v. Denno, [citation omitted]. In addition to being more consistent with the [illegible] application to non-[illegible] constitutional principles retroactively, this latest approach has the [illegible] effect [illegible] treatment of retrials."

and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved . . . we must determine retroactivity 'on each case by looking to the peculiar traits of the specific rule in question' " (citations omitted).

Normally, of course, the prior history of the rule in question would be a significant factor, but in the instant case, there is no prior history, since the argument presented in *North Carolina v. Pearce* and *Simpson v. Rice* is really a case of first impression in this Court. Of course, this Court's decision in *Stroud v. United States*, 251 U.S. 15, 64 L. Ed. 103, 40 S. Ct. 50, rev'g 251 F. 38, 163 C.C.A. 252 (1918), and *Stroud v. United States*, 255 U.S. 562, 65 L. Ed. 781, 41 S. Ct. 380 (1921), has been cited by the State of Maryland in prior state appellate proceedings, but it is submitted that this case is not directly in point, as will be discussed later. It would therefore appear that petitioner has been denied on previous cases on this point where decisions went both ways. See, for instance, *Patton v. North Carolina*, 381 F. 2d 636 (C.A. 4th Cir. 1967), cert. den. 390 U.S. 905, 19 L. Ed. 2d 831, 88 S. Ct. 819 (1968); *United States ex rel. Sinclair v. Russell*, 378 F. 2d 555 (C.A. 2d Cir. 1967), cert. den. 389 U.S. 880, 19 L. Ed. 2d 180, 88 S. Ct. 168, reh. den. 389 U.S. 987, 19 L. Ed. 2d 481, 88 S. Ct. 488 (1967); *United States v. Hall*, 384 F. 2d 445, 150 U.S. App. D.C. 384 (1967), cert. den. 390 U.S. 1036, 19 L. Ed. 2d 1136, 88 S. Ct. 1421 (1968). The issue in question had never been squarely decided by this Court prior to *North Carolina v. Pearce*, *supra*, and *Simpson v. Rice*, *supra*.

The only criteria in the opinion for the overruling decision, and the purpose of *North Carolina v. Pearce*, as

again and seems to recognize the enormous burden involved in securing successful retrial due to the absence of witnesses, unavailability of records, etc. As the Court said in *Linkletter*, 381 U.S. at 637, "Reparation comes too late." The Court also laid great stress on the fact that the overruling decision, in *Mapp v. Ohio*, *supra*, had no bearing on guilt or innocence, which appears to be a matter of primary importance.

It is true that in *Stovall v. Denno*, *supra*, the Court cited *Johnson v. New Jersey*, *supra*, to the effect that "these cases establish the principle that in criminal litigation concerning constitutional claims, the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such an application." *Johnson v. New Jersey*, 384 U.S. at 726-27, 16 L.Ed.2d at 888. There is nothing in *North Carolina v. Pearce*, *supra*, which requires such an application. The disruptive effect would be minimal, and it most certainly would clarify without harm to the State an egregious injustice to the individual [successful appellants] who have learned the hard way about the risks inherent in American criminal justice. The purpose of the new law is salutary. It will improve the caliber of justice in both the State and Federal Courts by encouraging defendants to appeal incorrect decisions without having to worry about being punished for the exercise of their constitutional rights. It will serve as a bulwark to the appellate system in this country, since primarily by appeals are the decisions formulated which clarify and improve the level of criminal justice in this country. This Court, after all, sits as a court of last resort for the criminal appellant and it is only through the defendant having an incentive to appeal

". . . . It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime as far as common law gave that protection. . . . Id., page 170

". . . . For what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict. Why is it that having once been tried and found guilty, he can never be tried again for that offense. Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. . . . Id., page 173."

B. An Absolutely Unfettered Right to Appeal in Criminal Cases Will Improve the Caliber of Criminal Justice in the United States.

In his dissenting opinion in *United States* v. *Ewell*, 383 U.S. 116, 15 L.Ed.2d 627, 86 S.Ct. 773 (1966), Mr. Justice Fortas stated in 383 U.S. at pages 127-128:

"In a different setting this Court has vividly criticized the Government's attempt to penalize a successful appellant by retrying him on an aggravated basis. *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119. Although the decision in Green was premised upon the Double Jeopardy Clause, its teaching has another dimension. Green also demonstrates this Court's concern to protect the right of appeal in criminal cases. It teaches that the Government, in its role as prosecutor may not attach

to the exercise of the right to appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge. Mr. Justice Black, speaking for the Court in Green, said "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193, 2 L. Ed 2d at 208, 81 A.L.R 2d 1119."

It is perfectly obvious that a criminal appellate system operates for the benefit of the defendant. However, it is submitted that appellate proceedings also serve the public good, because criminal appeals are the most effective means of correcting trial errors of evidence and procedure as well as clarifying incorrect interpretations of the law. Indeed, it may be that the benefit to the public outweighs the benefit to the individual appellant. Of course, the State of Maryland has continuously held that Dennis Moon fully deserved the harsher punishment that was imposed at his second trial. Even assuming this to be true, it is entirely irrelevant to the broader constitutional issues presented in this matter. The petitioner's character is totally irrelevant in so far as the Bill of Rights is concerned. This Court has always recognized that principle as was stated by Mr. Justice Frankfurter in *United States* v. *Rabinowitz*, 339 U.S. 56, 69, 94 L. Ed 653, at p. 662 "It is a fair summary of history to say that safeguards of liberty have frequently been forged in controversies involving not very nice people."

It is an undeniable fact that a large percentage of appeals filed in criminal cases are without substantial merit. It is also undeniable that in light of *North Carolina* v. *Pearce*, *supra*, the number of appeals will probably increase,

because many defendants will feel that they have nothing to lose. On the other hand, the petitioner believes it equally undeniable that in many cases where substantial legal error was committed, the defendant has not appealed because of fears about increased sentences. It cannot be emphasized enough that it is through constant scrutiny and review of our administration of criminal justice that our judiciary and our judicial processes are being improved and held accountable. Any experienced criminal lawyer knows of numerous cases in which the defendant was factually guilty, but was found legally guilty through erroneous rulings of evidence and misinterpretation of the law. Quite often, relatively lenient sentences have been enough to deter an appeal. The reason for this is very basic in our system of criminal justice, and really is the heart of the petitioner's argument. The blunt truth of the matter is that many criminal defendants are interested in the outcome of the trial only in so far as it affects punishment. For them, the ultimate reality of the entire criminal trial procedure is not the verdict, but the sentence. Questions of legal error are important to him only as a means of avoiding punishment. In the last analysis, all he really cares about is the result.

The petitioner maintains that through an unfettered appellate system, confidence in our criminal justice among defendants and among the general public, will be substantially enhanced. As the number of appeals increases, then the answer is to improve our appellate facilities, not impair the right to appeal. It is inconceivable that the State could justify a patently unconstitutional procedure on the basis of administrative difficulties and expense.

C. The Prohibition Against Multiple Punishment as Formulated in *Ex parte Lange*, *supra*, and Reaffirmed in *North Carolina* v. *Pearce*, *supra*, Is Indistinguishable From a Prohibition Against Increased Punishments.

It cost Dennis Mullene Moon an additional eight years imprisonment for exercising the constitutional right to appeal, which the State of Maryland afforded him, and which it invited him to exercise. It is true that Dennis Moon did not have to appeal. At least, it is true in the sense that a man does not have to breathe either. So the petitioner was punished for appealing. It may not have been intentional and it may not have been as a result of any malice or evil motivation by the second trial judge. In fact, it could even be said that the second trial judge exercised some leniency towards the petitioner, since he did, after all, suspend the two additional ten year sentences on charges for which the petitioner was convicted at his second trial which were not part of his first trial. It may even be that the petitioner fully deserved the sentence imposed by Judge Pugh, and perhaps deserved even more. But, be that as it may, and apart from all explanations and legal realizations concerning waiver, de novo proceedings, etc., Dennis Moon is now serving eight additional years in prison as a direct result of appealing.

If Judge Pugh had given the petitioner ten years imprisonment for armed robbery and then given him an additional ten years for the same armed robbery, every appellate Court, whether Federal or State, in this country would have struck down the sentences as being patently multiple punishments. The distinction between two ten year sentences and one twenty year sentence seems to

the petitioner non existent. It is, to quote Henry Fielding in *Tom Jones*, Book 6, Chapter 13, "A distinction without a difference."

In its opinion, the Maryland Court of Appeals attempts to distinguish between the *Moon* opinion and the decision of the Maryland Court of Special Appeals in *Reeves v. State*, 3 Md. App. 195, 238 A. 2d 307 (1968). The hard fact of the matter, however, is that the cases are not distinguishable. In *Reeves*, the appellant was given the maximum sentence upon retrial after having served some six years on a prior sentence for the same offense. If the Maryland Courts were to be completely consistent on their reasoning in this matter, they should agree that the serving of twenty-six years imprisonment on a twenty year sentence is entirely permissible, since Reeves, after all, had obtained a new trial and a new sentence. Under Article 5, Section 21A of the *Annotated Code of Maryland, 1957 Edition, 1968 Replacement Volume*, the State had the right to petition the Maryland Court of Appeals for a Writ of Certiorari in the *Reeves* case, which it did. That Court denied the State's petition. It would appear to the Petitioner that this would have been the ideal case for the Court of Appeals to uphold the rationale of the *Moon* decision, *supra*, since the same argument concerning de novo proceedings and waiver applied in both cases.

That the ultimate reality in criminal proceedings is the sentence rather than the conviction, is shown by the case of *Cuicci v. Illinois*, 356 U.S. 571, 2 L. Ed 2d 983, 78 S.Ct 839 (1958). In that case, having obtained two successful convictions on different victims of a multiple murder, the prosecution then went ahead with a third trial because it simply was not satisfied with the sentences from the first

two trials. However, if Cinci had been sentenced to death, at his first trial, no sophisticated person would have expected any further proceedings in the matter.

In a recent decision, *Williams* v. *Oklahoma City*, 394 U.S. ——, 23 L. Ed 2d 440, 89 S Ct 1818 (1969), this Court, by way of dictum on another point, stated: "The Court has never held that States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts (citations omitted)." As one example of unequal access, consider a defendant who is given a maximum sentence at his first trial. He would normally appeal merely as a matter of routine. A defendant receiving anything less that the maximum sentence, however, would appeal at his peril. Even under *Pearce*, an appellant might think twice about prosecuting his appeal. This certainly is not the "open and equal access to the Courts" envisioned in *Williams*.

Consider the following hypothetical situation. A defendant is convicted and sentenced to a relatively short sentence which he immediately begins to serve. An appeal is timely noted and some months later his conviction is reversed. In the meantime, the defendant has served the sentence imposed, but proceeds with his appeal. Would the State of Maryland argue that upon the defendant's reconviction a second sentence would not be a violation of the prohibition against multiple punishments? It would seem to be particularly logical in light of the de novo theory of which the State is so fond.

Your petitioner now urges this Honorable Court to go to the very substance of the double jeopardy provision.

In his brilliant study entitled, "*The Origins of the Fifth Amendment*", Leonard W. Levy traces the long and bitter struggle to carve out a prohibition against self incrimination, a struggle which is not yet completely over. Although the double jeopardy question is treated only incidentally to his main thesis, it is obvious that in any study of English common law and its evolution through American law, that the theme of crime and punishment is repeated over and over. Indeed, the two are inseparably linked in law, history, and, indeed, literature. It is urged that the true meaning of jeopardy is not the jeopardy of being tried twice, for there is no real harm in the trial itself. The jeopardy really attaches to the punishment, and it is submitted that this was the true intention of James Madison when he virtually wrote the Bill of Rights for the first session of the first Congress of the United States. See the separate concurring opinion of Mr. Justice Douglas and Mr. Justice Marshall, *North Carolina* v. *Pearce*, 395 U.S. at ——.

Of course, the State of Maryland may maintain that this is stretching the meaning of the term "jeopardy", but *Ex parte Lange, supra*, makes clear this Court's long standing concern in this area and its awareness of the inseparable connection between trial and punishment, and this brief can conclude with no better summary of this concern than from that decision (at p. 178):

> "There is no more sacred duty of a court than, in a case properly before it, to maintain those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and at such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

Conclusion

Based on the foregoing reasons, this Honorable Court's recent decision in *North Carolina* v. *Pearce*, *supra*, should be held fully retroactive, and this Honorable Court is further urged to hold that any increase of sentence at a subsequent trial, after a successful appeal of a prior conviction, should be held to violate the double jeopardy clause of the Fifth Amendment. Consequently, a Writ of Certiorari should issue to the Court of Appeals of Maryland, ordering them to take the appropriate measures necessary to implement this Court's opinion.

Respectfully submitted,

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